

November 10, 2020

Dr. Curtis Culwell
Executive Director
Texas School Alliance

Via email: curtis@texasschoolalliance.org

Re: TSA Federal Update

Dear Dr. Culwell:

The following information is provided relative to the federal activities of the TSA.

I. OVERALL FEDERAL VIEW

Joe Biden and Kamala Harris will be the next president and vice president of the United States. Meanwhile, Republicans gained ground in the House of Representatives and are favored to hang onto their Senate majority, but it is unclear who will replace retiring Senator Lamar Alexander (R-TN) in leading the education committee.

With the highest voter turnout in a century, Joe Biden and Kamala Harris decisively won the popular vote and secured at least 279 electoral college votes to become the forty-sixth president and the first female, Black, and Indian American vice president. Among other priorities, the Biden administration is expected to seek increases in education funding and place strong emphasis on protecting students' civil rights, a welcomed change from the Trump era.

In a statement, Alliance for Excellent Education (All4Ed) president and CEO Deborah Delisle said, "For four years, educational equity and civil rights protections have been intentionally eroded, and we look forward to swift action from the new administration on policies that ensure that every student – no matter his or her race, religion, background, or ZIP code – can thrive."

Though Democrats took back the White House, they will likely have at least two more years in the Senate minority, picking up only one seat. However, there's an outside chance that, come January, the Senate will be split 50-50 pending the outcome of runoff elections for both Georgia Senate seats. In that case, Vice President-Elect Harris would be the decisive tiebreaker vote. Meanwhile, Democrats held onto the House, but their majority narrowed.

With President-Elect Biden facing a divided Congress, the immediate focus returns to if – and when – the two parties will come together to negotiate further COVID-19 relief. Following the election, Senate



Majority Leader Mitch McConnell (R-KY) declared a stimulus bill will be a priority during the lame duck session. However, if past attempts are any indication, negotiations will not be easy, as many expect Republicans to push for cutting government spending during a Biden administration.

There is more than \$1.5 trillion between the latest Senate proposal and House Democrats' Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act. Moreover, the difference in education funding is stark: just \$70 billion in the Senate plan compared to \$175 billion in the HEROES Act. The Senate bill also would tie two-thirds of funding to schools reopening and has no funding for home internet connectivity, compared to \$12 billion that Democrats provided.

If both sides cannot come together soon, it will be up to the new Congress. President-Elect Biden promoted the original HEROES Act, calling on Republicans and Trump to support it. In his school reopening plan, Biden also suggests that Congress pass a separate \$30 billion emergency package to ensure schools can reopen safely and called for an additional \$4 billion to upgrade technology and broadband. And unlike President Trump and Republican lawmakers, Biden would not condition funding on districts offering in-person classes. Instead, he has said his administration will issue national guidelines for reopening based on the level of viral spread in a community and would leave decisions of when to reopen schools up to state, local, and tribal officials.

A Biden presidency also will steer education policy in a different direction by pushing for more funding and focusing on initiatives that have gotten little attention from the Trump administration. While it is only speculation as to who will be Secretary of Education, Biden promised to nominate a former classroom teacher. We also can look to the campaign to see what some of the new secretary's priorities will be. For example, Biden has pledged to triple Title I funding to help raise teacher salaries and increase student supports including school psychologists, counselors, nurses, and social workers, especially in high-poverty schools. Additionally, he called for universal prekindergarten, free community college, and doubling the size of the Pell Grant.

Unlike these budget requests, which require congressional approval, Biden has pledged executive action to reverse the Trump administration's approach to students' civil rights, reissuing Obama-era guidance to curtail racial disparities in school discipline, protect the rights of transgender students, and improve racial diversity in colleges and K-12 schools. The new administration also has promised to extend protections for Deferred Action for Childhood Arrivals (DACA) recipients, though a permanent fix would require legislation.

It is less clear whether the Biden administration will modify guidance issued by Secretary Betsy DeVos to maintain statewide assessments and accountability this spring. While Biden's platform was critical of the use of standardized tests for high-stakes purposes, prominent civil rights groups and Democratic-lawmakers supported DeVos's decision to administer assessments this spring to help shine a light on inequities exacerbated by the pandemic and potential learning losses.



House education leadership will remain stable while the makeup of the Senate Education committee is in flux. Health, Education, Labor, and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN), as well as Mike Enzi (R-WY) and Pat Roberts (R-KS), are retiring. Additionally, although Susan Collins (R-ME) won her reelection contest, Kelly Loeffler (R-GA) is heading into a runoff against Democratic challenger Raphael Warnock. On the Democratic side, Doug Jones (D-AL) lost his reelection bid.

Assuming Republicans maintain their Senate majority, Richard Burr (R-NC), is next in line to serve as chairman, followed by Rand Paul (R-KY). Burr, however, plans to retire in 2022 and is facing a federal investigation for stock trades he made during the pandemic. While Alexander and Burr often have been aligned in their views on education, if Burr declines the chairmanship, Paul would bring a much more significant – and conservative – change in leadership. For example, Senator Paul voted against the Every Student Succeeds Act and believes the “existence of the Department of Education is an overreach of constitutional authority.” Paul also has supported legislation to promote private school vouchers, prohibit the federal government from placing conditions or requirements on education funding, and eliminate standardized testing.

Given both Georgia runoffs and uncertainty over Burr’s plans, it may be a while before we know who will join Patty Murray (D-WA) in leading the HELP Committee in the next Congress.

II. TEXAS ELECTION RESULTS

The 2020 United States House of Representatives elections in Texas was held on November 3, 2020, to elect the 36 U.S. Representatives from the state of Texas, one from each of the state’s 36 congressional districts.

Texas Republicans largely held off Democrats’ ambitious goal of taking several U.S. House seats from the GOP as election results came in late Tuesday and early Wednesday.

The Texas congressional delegation was at status quo and no incumbent lost their race and no seats had flipped parties.

Seven Republican incumbents whom Democrats targeted cruised to reelection. Rep. Chip Roy of Austin beat former state Sen. Wendy Davis in the 21st Congressional District, which includes parts of Austin, San Antonio and the Hill Country. U.S. Rep. Dan Crenshaw, R-Houston, defeated Democrat Sima Ladjevardian in the Houston-based 2nd Congressional District.

Similarly, U.S. Rep. Van Taylor, R-Plano, also held off a challenge from Democrat Lulu Seikaly in Collin County’s 3rd Congressional District. U.S. Rep. Roger Williams of Austin fended off Democrat Julie Oliver to retain his 25th Congressional District, which includes Austin and a large swath of rural Central Texas. U.S. Rep. Michael McCaul of Austin beat Democratic challenger Mike Siegel for the 10th Congressional District. U.S. Rep. John Carter beat Donna Imam to keep his 31st Congressional District north of Austin. U.S. Rep. Ron Wright of Arlington fought off Democratic challenger Stephen Daniel.



In the 15th Congressional District, which was not originally thought to be competitive, U.S. Rep. Vicente Gonzalez, a McAllen Democrat, narrowly won over Republican Monica De La Cruz-Hernandez, per Decision Desk HQ.

In the 22nd Congressional District, Fort Bend County Sheriff Troy Nehls beat Democratic former diplomat Sri Kulkarni for a seat being vacated by U.S. Rep. Pete Olson, R-Sugar Land, according to Decision Desk HQ.

In the 23rd Congressional District, which runs along the Texas-Mexico border and is open due to another Republican retirement, GOP candidate Tony Gonzales held off Democrat Gina Ortiz Jones by a narrow margin.

And in the 24th Congressional District, a largely suburban North Texas seat, former Irving Mayor Beth Van Duyne prevailed over former Carrollton-Farmers Branch school board member Candace Valenzuela.

Those GOP wins came near the end of an election cycle in which Texas was the centerpiece of the U.S. House Democratic offensive. Buoyed by narrowed congressional margins in Republican districts in most of the metropolitan areas, the House Democratic campaign arm opened a satellite office in Austin to continue its advances. As a result, both parties spent tens of millions of dollars in the state, and Texans faced an onslaught of political advertising this fall.

Two Democrats who flipped Republican districts in 2018 held on to their seats. U.S. Reps. Colin Allred of Dallas and Lizzie Pannill Fletcher of Houston won their races.

Meanwhile, former U.S. Rep. Pete Sessions, a Republican who lost reelection in 2018 to Allred, will return to Congress. Sessions relocated to the open 17th Congressional District, which is rooted in Waco, Bryan-College Station and the rural areas in between.

Three new members-elect in safe Republican seats also won their races. In the 4th Congressional District that covers the northeastern part of the state, State Sen. Pat Fallon will replace John Ratcliffe, who was director of National Intelligence. Retired Air Force officer August Pfluger will replace retiring U.S. Rep. Mike Conaway in the 11th Congressional District, which includes a large portion of West Texas. And former White House physician Ronny Jackson will replace retiring U.S. Rep. Mac Thornberry in the sprawling 13th Congressional District that covers the Panhandle and a large swath of the Texas-Oklahoma border.

III. SECRETARY OF EDUCATION

Linda Darling-Hammond is leading the Biden transition team. She leads the California board of education and the Learning Policy Institute and has often mentioned as a possible Democratic education secretary. She has ruled out taking the job herself; she was head of Obama's transition team for education in 2008.

Some possible education secretaries under President Biden:



- A lot of speculation has focused on Biden nominating American Federation of Teachers President Randi Weingarten or former National Education Association President Lily Eskelsen Garcia. The unions endorsed Biden, and they don't want a repeat of the tensions that characterized their relationship with the Obama administration.
- Late last week, as the election swung in Biden's favor, Weingarten did not definitively rule herself in or out. She said that she was honored to be mentioned but was focused on her work leading the AFT. (Current NEA President Becky Pringle did rule herself out.) However, if the GOP keeps its control of the Senate in the next Congress, it might be difficult for Weingarten and García to get enough votes in the Senate. Something else to keep in mind: Jill Biden is a member of the NEA.
- Even if it's not someone from the AFT or NEA, they undoubtedly will influence Biden's pick. That could lead to Biden selecting a major school district superintendent who gets union backing. Such names could include Brenda Cassellius of Boston and Denise Juneau of Seattle; both are former state education chiefs. Juneau also ran unsuccessfully as a Democrat for a 2016 U.S. House seat in Montana. Other superintendents to look out for, based on a list floated by Democrats for Education Reform, include William Hite of Philadelphia and Sonja Santelises of Baltimore. However, DFER and the unions have clashed in the past on key issues like charter schools; Biden's campaign platform sided with the unions in supporting significant new limits on charter schools.

If Biden picks a district leader, it'll be interesting to see if that leader's response to the pandemic becomes an issue during the confirmation process.

- Don't discount Biden picking someone from higher education. For example, back in 2016, University of Maryland, Baltimore County President Freeman Hrabowski was mentioned as a possible secretary in a Hillary Clinton administration. Last month, Hrabowski wrote about higher education's role in reversing structural racism, which is set to be a key education issue for the next administration. Biden has pledged to pick a public school educator to be education secretary, but last month his campaign didn't specify whether that means someone with a K-12 or higher education background.
- Obama picked former New York state schools chief John B. King Jr. to be his second education secretary. And former President Bill Clinton picked South Carolina Gov. Richard Riley to lead the Education Department. Someone with a background in state leadership could match what Biden wants.
- As we noted last February, no one has transitioned directly from Congress to leading the Education Department. But one name in the mix could be Rep. Jahana Hayes, D-Conn., the 2016 National Teacher of the Year. Hayes was elected to Congress in 2018, is a member of the House education committee, and made waves last year when she confronted U.S. Secretary of Education Betsy DeVos about arming teachers. Sen. Michael Bennet, D-Colo., the former Denver schools superintendent, has also been mentioned, but Bennet said earlier this month he wouldn't serve as Biden's education secretary.



One other point: Keep an eye on which Obama Education Department alums might return to the agency. Although former top officials – think assistant secretaries – might not rush to return to their former posts, it’s not out of the realm of possibility: Kenneth L. Marcus served as assistant secretary for civil rights at the department under Trump, and was delegated the responsibilities of that job under President George W. Bush. (That civil rights position in particular could be very important in a Biden Education Department.)

In general, people a few rungs below those leadership positions during the Obama era might eye a return to more senior jobs in a Biden administration.

IV. REGULATORY CHANGES

What would a Biden presidency mean for education policy? The answer depends on the balance of power in Congress, and, if Democrats take the Senate, whether they eliminate the filibuster. That’s because the bulk of Joe Biden’s official education plans will take congressional action to implement – especially his calls to significantly boost spending on early childhood education, Title I of the Elementary and Secondary Education Act, the first two years of college, and more.

Still, if the last 12 years have taught us anything, it’s that a president wields significant power through executive orders and regulatory action that do not require congressional consent. Executive authority and regulatory strategies are critical policy tools these days. Whether you view this as appropriate or executive overreach may depend on your party affiliation and who is in office.

So, what can we expect a President Biden to do with pen and his phone, as President Obama put it? Overall, expect quick action to establish the administration’s brand on social justice issues, colored by the Covid-19 experience and the 2020 summer of unrest. In particular, here is a list of actions we will likely see in the early on. The list is divided into actions formally mentioned as campaign promises and others noted more informally during the campaign:

Regulatory items in Biden’s official campaign promises

- Forgiving student loans. The president doesn’t need congressional approval to adjust student loan payments, as Trump’s executive order suspending federal student loan payments demonstrates. President Biden is now campaigning on the authority, stating that he will eliminate student debt for individuals who meet eligibility criteria, such as qualifying low-income earners who attended public universities or teachers who serve in high-need schools. That relief would likely happen quickly and, if the politics play out, couple with congressional action on a COVID relief fund.
- Protecting student borrowers from fraud. The Borrower Defense rule of the Higher Education Act is one of many long-winding regulatory sagas that would start yet another chapter under a Biden administration. The Act allows borrowers of federal student aid to assert as a defense to repayment “any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.” The Obama administration was eager to provide relief



to students who were on the wrong side of institutional fraud or misconduct by institutions benefitting from federal student aid. The Trump administration took a different view on the matter and issued new rules that make it harder for borrowers to have their student debt forgiven. Meanwhile, Secretary DeVos has been in and out of courts, accused in lawsuits of failing to carry out the law and of improperly revising the new rules. The Education Department says it acted properly. There is enough legal paperwork here to keep attorneys working long after a new Biden administration reverts to the Obama-era rules and begins to process overdue debt relief claims with some urgency.

- Deferred action for childhood arrivals. It's been turbulent times for undocumented immigrants brought to the United States as children. The Supreme Court prevented the Trump administration from entirely ending the Obama-era program that shielded these people from deportation. The Trump administration did tighten many aspects of the program, such as eligibility and renewal. Ultimately Congress has to sort this out, but look for a Biden administration to step-in early with more predictable and durable protections for eligible young immigrants and an invitation to Congress to return to work on the Development, Relief, and Education for Alien Minors (DREAM) Act, which has been working its way through Congress since 2001.
- Applying anti-gender discrimination rules to gay and transgender youth. Title IX of the Education Amendments of 1972 asserts that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Obama administration clarified that discrimination could be based on a student's gender identity, which may be different than the sex designation on the individual's birth certificate. The Trump administration rescinded that interpretation. A Biden administration would likely restore the Obama-era Title IX guidelines, especially given the recent Supreme Court decision applying protections to gay and transgender employees. This may be one of the first actions taken upon taking office.
- Desegregation. The Biden platform states that he "will reinstate Department of Education guidance that supported schools in legally pursuing desegregation strategies and recognized institutions of higher education's interests in creating diverse student bodies." This is likely going to be cross-cutting guidance that clarifies how school officials can use and coordinate federal education funding to support desegregation strategies as a component of school improvement as well as community economic development. Such guidance would also set the stage for Congress to advance the Strength in Diversity Act of 2019 (HR 2639), which encourages cross agency coordination in the development and implementation of school diversity initiatives.

Other commitments Joe Biden made on the campaign trail

In addition to explicit commitments, Vice-President Biden has touched on a range of issues during the campaign that will likely see regulatory or executive action in the first 100 days.



- Handling allegations of sexual harassment in schools and colleges. Through guidance and dear colleague letters, the Obama administration sought to place more responsibilities on school administrators to address and adjudicate claims of sexual harassment. Critics said this did not provide enough protections for the accused. The Trump administration changed course, engaging in full rulemaking, revising key terms, responsibilities, and the burdens upon the parties during a hearing process. Today, the burden of proof falls more heavily upon the complainant. A new Biden administration would likely revert to the Obama-era policy, though it will take time to undo Trump's regulations.
- Addressing disparities in school discipline. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin. This includes policies and practices that intentionally discriminate against minority students. The Obama Administration applied a "disparate impact" approach to school discipline, putting out guidance indicating that disparities in suspension and expulsion rates could be seen as evidence of discrimination. The Trump administration then repealed the guidance. A Biden administration would likely reinstate it, and that's likely to happen almost immediately.
- Reconsidering assessments and accountability. On the campaign trail, Vice President Biden expressed his concern about assessments and stated that he would scale back the role that standardized tests play in our schools. Yet, the candidate hasn't committed to waiving summative assessments or undermining the state plans for accountability as required by The Every Student Succeeds Act. The likely outcome is a mix of waivers and guidance. The waiver may allow states to adjust the use of assessment results for the purposes of school accountability with guidance about ways to strike the "right balance" of tests required by the state and used by districts. This approach builds on current state work to redesign summative assessments, as encouraged by both the Trump administration's request for innovation (without a waiver) and the Obama "Testing Action Plan" of 2016.
- Supporting students' mental health. The Biden campaign would like to "double the number of psychologists, counselors, nurses, social workers, and other health professionals in our schools." An expedient way to achieve this is to piggyback on the fast-growing school-based telehealth field, which accelerated in 2020 due to the COVID-19 pandemic. The Trump administration issued guidance earlier this year clarifying how Medicare can be used for telehealth. A Biden administration may extend the flexibility to school-based services. For example, the new administration could issue guidance clarifying the authority of a state to link the eligibility of school-based telehealth for reimbursements to services identified in a student's individualized education plan. This kind of agency guidance would accelerate trends already underway for school-based health services.
- Charter schools. Vice President Biden states that he does not support the use of federal funding for "for-profit" charter schools and the Biden-Sanders Unity Task Force proposes to "ban for-profit private charter businesses from receiving federal funding." A Biden presidency will likely be pressured by union advocates to limit the eligibility of future Charter Schools Program grantees only to not-for-profit entities that do not contract with for-profit management organizations. The



administration could also require that grantees receive the blessing of the local school district that would otherwise serve the current or potential students of the school. As with the scrutiny of “for-profit” in other education sectors, however, the details matter, and political gestures will likely find compromise with the concerns of charter school advocates seeking to find the best education options for poor and minority students.

- Scrutinizing the role of for-profit in higher education. A Biden administration will certainly refocus the Department of Education’s scrutiny on for-profit colleges and the role that for-profit companies play in the delivery of academic programming for institutions of higher education. This is likely to happen in at least two ways. First, Senator Elizabeth Warren and like-minded Democrats, are keen on broadening the prohibition in the Higher Education Act against paying commissions for recruiting and enrolling new students. That would constrict how for-profit organizations can work with schools. Second, the long and tortured interpretation of “gainful employment” as it applies to career education programs under the Higher Education Act may start up again. The Trump administration rescinded the prior regulations, so those who lost their long-fought work on this matter may want to take them up again.

As more information is obtained, we will share with TSA.

Very truly yours,

Thompson & Horton LLP

A handwritten signature in blue ink, appearing to read 'Chris Borreca', written in a cursive style.

Christopher P. Borreca

CPB/bg

cc: Dee Carney
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